between the United States and the Federation of Malaya. It was also noted that the aide-memoire of October 15, 1958 and the Note of the Malaysian Ministry of External Affairs were to be regarded as constituting the agreement in this matter (pages 166-167).

Article 7 of the Dawes-Simon Treaty expressly provides for the principle of specialty as follows: —

"A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has surrendered."

We therefore agree that it would not be necessary to make a finding whether there is a valid extradition treaty or arrangement between the United States and Malaysia. But for the purpose of satisfying the requirement of section 5(2) of the Ordinance, it will be sufficient if there can be found somewhere an undertaking on the part of that foreign country (in this case the United States) that the principle of specialty is guaranteed. The fact that no order has been made under section 3(1) in respect of the United States does not preclude us from examining the Dawes-Simon Treaty of 1931 and the undertaking expressed in the subsequent exchange of letters between the two governments. We have found it as a fact that the 1931 treaty although it has not been gazetted, read with the exchange of letters constitutes an undertaking in compliance with the requirement of section 5(2) of the Ordinance.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

TAN KUI LIM & ANOR. v. LAI SIN FAH

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 4 & November 3, 1979]

[Kuching — Federal Court Civil Appeal No. 92 of 1979]

Family Law — Adoption — Adoption of grandson by Chinese Lady in Sarawak — Whether adoption must be in accordance with Chinese customary law — Adoption contrary to Chinese custom — Illegality — Adoption Ordinance (Sarawak Cap. 91), ss. 2, 5, 6(2), 6(3), 7 & 8.

Chinese Customary Law — Adoption of grandson by grandmothers — Illegal.

In this case the respondent, the son of Madam Chang Shok Moi (deceased), applied for an order declaring the adoption of her grandson by the said Madam Chang Shok Moi to be null and void. The learned trial judge held that the adoption was contrary to Chinese custom and was therefore illegal. The respondents, the natural parents of the adopted grandson, appealed.

Held: (1) the adoption of a boy by a Chinese in Sarawak could only be valid if it is in accordance with Chinese customary law and the proviso to section 6(3) of the Adoption Ordinance recognises by necessary implication, if not expressly, that law;

(2) under Chinese customary law the adoption of the grandson by the grandmother in this case was void and the court could not therefore enforce the transaction, which was vitiated with illegality.

Cases referred to:-

(1) *Tay Pok Ann* v. *Tay Sok Kiong & Anor.* [1955] S.C.R. 17.

(2) *Chan Bee Neo & Ors.* v. *Ee Siok Choo* [1947] S.C.R. 1.

(3) *Phiong Khon* v. *Chonh Chai Fah* [1970] 2 M.L.J. 114.

FEDERAL COURT.

Anthony Liew for the appellants.

John Lee for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is concerned with the validity of an adoption by a lady, since deceased, of her grandson as her son. The estate involved is said to be now worth a million dollars.

The deceased, one Madam Chang Shok Moi, widow of Lai Chee, had one son, Lai Sin Fah and five daughters. The grandson in question, Tan Ten Chew, is the son of Lai Joon Nyiat, one of the daughters and the only one amongst them involved in the dispute. Section 17 of the Administration of Estates Ordinance (Cap. 80 Laws of Sarawak, 1947 Edition) applies the customary Chinese law on inheritance, since neither the English law nor the Distribution Enactment 1958 of West Malaysia has been extended to Sarawak. If the law correctly is that daughters are not entitled to a distributive share but only to maintenance before marriage, see *Tay Pok Ann* v. *Tay Sok Kiong & Anor.*[1] at page 20, it means that the petitioner Lai Sin Fah inherits the whole of the residuary estate of the deceased as the only son, subject to a duty to maintain his unmarried sisters. But if the *de jure* adoption of the grandson is valid and legal, the petitioner would have to share the estate equally with his erstwhile nephew. The stakes therefore in this application, instituted curiously by petition and not by originating summons under Order 54A rule 1A Rules of the Supreme Court, 1957 for an order declaring the adoption null and void are half a million dollars. The petitioner cited the natural parents of the boy as the respondents. They were the ones who had given away their son in adoption.

The adoption was under the Adoption Ordinance (Cap. 91, Sarawak Laws), and it is now necessary to consider the several sections of the Ordinance relevant to this case.

Section 2 which reads

"2. — (1) Subject to the provisions of this Ordinance any person may adopt a child.

(2) Such adopted child shall stand in the same relation to the adopting parent or parents as would a child born in wedlock and shall have all the rights and privileges of a legitimate child in respect of the obligations and estate of the adopting parents.

(3) The natural parents of such adopted child shall have no control or right over such adopted child and such adopted child shall have no claim by inheritance to the property of his natural parents.

(4) The provisions of subsections (2) and (3) shall cease to have effect if the adoption is annulled under the provisions of section 7."

enables any person to adopt a child and sets out the effect of the adoption in relation to the inheritance of the estates of the adoptive and the natural parents.

The procedure on adoption is outlined in section

3. We need not concern ourselves with this section since it is apparent on the face of the certificate of adoption that there had been compliance with the statutory requirements, except to mention that the doubt cast by the petitioner on the identity of the adoptive parent is without foundation. That the deceased was present at the adoption and did affix her thumb print to the certificate of adoption is clear from the notation thereon of her identity-card number the correctness of which there is no doubting.

The conditions of valid adoptions are set down in section 5 which reads:

"5. No adoption in Sarawak shall be registered unless the District Officer is satisfied by evidence upon oath or otherwise —

(a) that the adopting parent or, if there be two, each of the adopting parents is a fit and proper person to have the care and custody of the child;

(b) that the adopting parent or parents has or have sufficient means reasonably to maintain the adopted child according to the social status of the adopting parent or parents until the child reaches the age of eighteen years;

(c) if there be two adopting parents that they are legally married to one another by custom or otherwise."

No argument arises over the deceased's ability to satisfy these conditions.

Registration of the adoption is necessary within 12 months of the adoption upon penalty of committing an offence punishable under section 6(2) with the further consequence that it could be void, under sub-section (3). This sub-section (3) reads:

"(2) Except as is provided by sections 9 and 11, the adoption of a child by persons of the Chinese race or professing the Muslim faith shall be void unless registered in accordance with the provisions of this Ordinance:

Provided that a court of a Magistrate of the First Class constituted by the Resident may, on the application of a Magistrate, Probate Officer or interested party, direct a District Officer to register an adoption if it is satisfied that the child has been adopted in accordance with the custom of the race to which the adopting parents belong or belonged, and the fact that one or both of the adopting parents are dead shall be no bar to such registration notwithstanding the provisions of section 3."

Section 7 provides that only the High Court may annul an adoption upon proof that the adoption is not in the interests of the child, and section 8 further provides that

"8. Where there is any question whether the adoption of any child should be effected or annulled the interests of such child shall be the paramount consideration."

The petition in this appeal is not however a case of annulment. It is for a declaration that the adoption is null and void on the ground that the adoption was not in accordance with Chinese custom.

The first question therefore to be decided is whether the adoption of a Chinese boy in Sarawak must be in accordance with the Chinese custom relating to adoption before it is to be valid and to be properly registrable in accordance with this Ordinance. In none of the three sections dealing with adoption, viz. sections 2, 3 and 5, particularly in section 5 which sets out the conditions for adoption is there any provision that the adoption must be in accordance with custom. And it has been laid down in *Chan Bee Neo (f) & Ors.* v. *Ee Siok Choo (f)*,[2] approved, though in an *obiter*, by this court in *Phiong Khon* v. *Chonh Chai Fah*[3] at page 117 that Chinese customary law applies in Sarawak (a) where the custom in question is expressly regulated by a Sarawak Ordinance or by rules under an ordinance or (b) where the custom is recognised, either expressly or by necessary implication, in a Sarawak Ordinance. These sections 2, 3 and 5 do not apply the customary law.

However section 6(3), *supra*, which makes registration the essential for a valid adoption does provide in the proviso that in the case of a refusal or failure of a District Officer, as the registration officer in section 3, to register an adoption, a court of competent jurisdiction may direct the officer concerned to register the adoption, if it is satisfied that the child has been adopted in accordance with the custom of the race to which the adopting parents belong or belonged. In this case, the adoption must be in accordance with the customary law of adoption of the Chinese.

In our view and with respect, the adoption of a boy by a Chinese could only be valid if it is in accordance with the Chinese customary law and we therefore hold that the proviso to section 6(3) recognises by necessary implication, if not expressly, this law.

The next question is what is this law. Foreign law is a fact to be proved by evidence acceptable to the court. Section 45 Evidence Act provides that in the proof of such law, the opinions of experts, that is persons specially skilled in such foreign law, are relevant facts. Section 38 of the same Act provides that any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain such law and any report of a ruling of the courts of such country contained in a book purporting to be a report of such rulings, is relevant. By judicial comity or courtesy or *stare decisis*, a ruling of one of our courts may be strongly persuasive or binding.

No decision has however been uncovered from the reports of the then Supreme Court of Sarawak or any court of competent jurisdiction in Sarawak on the validity in Chinese customary law of the adoption of a grandson by his grandparents. No authoritative books of law or judicial decisions of the courts of the domicile have been produced and referred to. But two persons gave their opinions as experts on this law in affidavits affirmed by them.

One was a venerable gentleman of some 76 years of age. He was Lam Chun Ngin, a Registrar of Chinese Marriage for the Hakka community (which the parties to this action factually are) in Kuching for the past 22 years. He affirmed that in the course of his duties he had to study and apply Chinese law and customs and his evidence in court on this law and customs is as follows:

"(a) In the case of agnates, to select from the generation immediately below the adopter, and the individual to be adopted must hold in the family tree the same position, relative to common ancestor, after as before adoption. It is contrary to the order of nature or generation either above or below that grade should be selected. This custom applies equally to adoption of cognates, that is to say, of relatives on the mother's side. It therefore follows that a maternal grandson cannot be adopted as a son of a maternal grandparent.

(b) Adoption of a child is made with the cognisance of the whole family of the adopter and the newly adopted child must make obeisance before the ancestral tablets of the adopting family in token of his admission, a ceremony without which no change in the family life would be effectual.

(c) During the funeral ceremony of a Chinese deceased, sons are wearing white sackcloth mourning dresses and maternal grandsons are wearing blue ones. It is customary to read out a list of recognised descendants which is burnt at the ceremony or put in the newspapers. The degree of the mourning dress worn by a person during the funeral ceremony of his parent or grandparent is to distinguish his or her status or relationship with deceased."

The other was Liong Kim Chong, the Kapitan China, who as we understand the position, is a recognised leader of the Chinese Community, though his exact legal status at present appears to be somewhat obscure. He claimed the same knowledge and gave the same opinions in such similar language that there is no necessity to repeat them here. His view is that the adoption of the grandson by his grandmother cannot be sanctioned by Chinese custom.

At the hearing of the petition in open court, both parties were agreed that the case be tried on the affidavit evidence and that no oral evidence be adduced except the evidence of the petitioner and for the respondents, that of the Resident who directed the District Officer to register the adoption.

The learned judge accepted Lam Chun Ngin and Liong Kim Chong as experts and on the evidence before him, held that the adoption was contrary to Chinese custom and practice and accordingly he declared the adoption to be void and of no effect.

Certain notes on Chinese Family Law originally compiled and printed in 1927 were reprinted in 1955 at the Sarawak Government Printing office by the Acting Government Printer. In Chapter V of Part I, it is stated at pages 19-21 that

"An adoption is a contract, usually for some consideration, to which the consent of both parties — the adoptive family and the family of the person to be adopted — is necessary. It is a family arrangement and can be carried out without the sanction of the court. It shall be lawful, however, for the court on reasonable complaint being made by either of such families, or by the person to be adopted, to inquire into any grounds of objections against any adoption being carried out and to forbid any adoption or to make any other order thereto as it thinks proper and just.

....

If a Chinese has no son he may adopt a nephew who is the son of one of his brothers; if there is no such nephew, then the grandson of one of his uncles or the great grandson of one of his granduncles; if there are no agnates of a lower generation or young enough in age, such Chinese may adopt a stranger, if possible of the same sing, commonly called seh or Chinese surname; if no such stranger is obtainable, such Chinese may demand in adoption a child of a sister or a grandchild of an aunt. An elder brother is entitled to adopt any one who will live. An elder brother is bound to give a son, if one is available, in posthumous adoption to a younger brother who has died childless.

....

It is illegal for a father to adopt a grandson during the lifetime of his own son, even though that son be without a natural-born son."

Though the reprint carries the precautionary advice of the printer that the principles quoted relate to erstwhile Chinese custom and bear little relation to current Chinese law, it is implicit in the evidence of the two experts that there has been no change in the customary law.

Now there is a slight difference. Whereas the experts are clearly of the opinion that the adoption of the grandson by the grandmother is contrary to and therefore void by Chinese custom, the notes state that the illegality subsists only during the lifetime of the son. But while noting this difference, we do not consider that it has any relevance since the son (the petitioner) is at all material times and still is alive, and the adoption is clearly against Chinese custom.

The respondents however urged under section 8, *supra*, that the adoption should not be annulled in the interests of the child, since that is the paramount consideration. It certainly is in the child's financial interests that he should come into his expected inheritance but finance is only one of the matters that a court must take into consideration. From the very inception of the adoption the physical and psychological care of the child has been at the hands of his natural parents and he doubtless will continue to receive the same love and care. The parents have, as respondents, not made the slightest attempt to contest the illegality issue. It is settled law that no court will enforce a transaction vitiated with illegality.

With respect, we agree with the learned judge that the declaration sought by the petitioner must be made that the adoption of the grandson by the deceased is illegal. The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Goh & Liew; Lee & Co.*

WIX CORPORATION SOUTH EAST ASIA SDN. BHD. v. MINISTER FOR LABOUR AND MANPOWER & ORS.

[O.C.J. (Harun J.) April 17, 1978]

[Kuala Lumpur — Originating Motion No. 66 of 1977]

Administrative Law — Application for certiorari — Conciliation — Application to produce reports of conciliation proceedings — Reference by Minister to Industrial Court — Whether reports relate to affairs of state — Privilege — Industrial Relations Act, 1967, ss. 20 & 54 — Evidence Act, 1950, ss. 123 & 162.

Evidence — Reports of conciliation proceedings — Whether reports relate to affairs of state — Evidence Act, 1950, ss. 123 & 162.

Industrial Law — Reports of conciliation proceedings — Whether relate to affairs of state — Privilege — Evidence Act, 1950, ss. 123 & 162 — Industrial Relations Act, 1967, ss. 20 & 54.

In this case the applicant had applied for an order of *certiorari* to quash an order of Reference made by the Minister of Labour to the Industrial Court. The original dispute in this case related to dismissal and in accordance with section 20 of the Industrial Relations Act was referred to the Regional Director of Industrial Relations (Selangor and Pahang) for conciliation. The Regional Director made a report to the Director-General of Industrial Relations who in turn made a report to the Minister of Labour. In this application the applicant applied for a subpoena directing the Director-General of Industrial Relations to produce *inter alia* the two reports. Objection to the production of the reports was made on the ground that they related to affairs of state and privilege was claimed under sections 123 and 162 of the Evidence Act, 1956.

Held: (1) the reports under section 20 of the Industrial Relations Act 1967 are not official records relating to affairs